DOCUMENT RESUME

ED 374 763 HE 027 770

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|---|---|
| AUTHOR | Flygare, Thomas J. |
| TITLE | The Family and Medical Leave Act of 1993: Applications in Higher Education. |
| INSTITUTION | National Association of Coll. and Univ. Attorneys, Washington, D.C. |
| PUB DATE | Feb 94 |
| NOTE | 17p. |
| AVAILABLE FROM | National Association of College and University Attorneys, One Dupont Circle, Suite 620, Washington, DC 20036 ($6.50). |
| PUB TYPE | Guides - Non-Classroom Use (055) |
| EDRS PRICE | MF01 Plus Postage. PC Not Available from EDRS. |
| DESCRIPTORS | *Administrative Policy; Civil Rights Legislation; *Compliance (Legal); Eligibility; *Employee Absenteeism; Employment Practices; Federal Legislation; Federal Regulation; Higher Education; *Labor Legislation; *Leaves of Absence; Personnel Management; *Personnel Policy |
| IDENTIFIERS | Americans with Disabilities Act 1990; *Family and Medical Leave Act 1993 |

ABSTRACT

This pamphlet explores how universities must integrate the Family and Medical Leave Act of 1993 (FMLA) with existing institutional leave policies and how universities can harmonize the requirements of the FMLA with other federal mandates, particularly the Americans with Disabilities Act (ADA). First, basic FMLA concepts are discussed, including eligibility for FMLA leave, notice requirements, medical justification, intermittent leave, relationship of paid to unpaid leave, benefits before and after leave, reinstatement to employment, and enforcement procedures. Next, a series of hypothetical situations is analyzed to highlight practical problems in applying the FMLA to higher education. Finally, several special issues relating to implementation of the FMLA in higher education are raised, including unionized employees, academic year work schedules, "key employee" exceptions, substitutions of paid leave for unpaid FMLA leave, deductions from compensation of salaried employees for intermittent FMLA leave, and relationship of the FMLA and the ADA. (JDD)

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# The Family and Medical Leave Act of 1993: Applications in Higher Education

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# The Family and Medical Leave Act of 1993: Applications in Higher Education

*Acknowledgement*
The author wishes to thank Stuart Bompey of Orrick, Herrington & Sutcliffe in New York City; Linda Henderson, NACUA Manager of Publications; Hattie Kaufman, Counsel to the University of Alabama System; Shelley Sanders Kehl, Counsel to College of Aeronautics and Manhattan College; Nicholas Long, Counsel to the Rhode Island Office of Higher Education; and Lawrence White, University Counsel to Georgetown University, for their many valuable editorial and substantive contributions to this pamphlet.

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This is one of a series of publications from NACUA, an organization of colleges and universities joined together for mutual assistance in identifying and resolving legal problems.

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February 1994

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# The Family and Medical Leave Act of 1993: Applications in Higher Education

## Introduction

David Johnson is a tenured, full professor in the university's liberal arts college. His current teaching schedule, typical for senior faculty, consists of two courses that meet on Tuesdays and Thursdays. He recently sent the following note to his dean:

> The chiropractor has advised me that I must bring Mary in for treatments each Thursday for at least the next year. Hence, I will be unable to meet my classes on those days. In 27 years at this university, I've never taken a sick day so I'm sure I have plenty of paid leave.

A year ago, Johnson's request would have been dismissed as fanciful. Certainly there was no legal reason to give his note serious consideration. University policy did not permit the part-time leave requested by Johnson, particularly not for the purpose of transporting another person to any type of medical treatment. Moreover, the university had never recognized the opinion of any chiropractor; in fact, the university's health insurance did not even cover chiropractic treatments. Johnson could have requested an unpaid leave of absence for an entire semester (no partial semester leaves were permitted), to be granted at the discretion of the university president. No benefits would have been provided during such a leave, except that health insurance could have been continued at the sole expense of the employee.

That was all before the Family Medical Leave Act of 1993 ("FMLA") took effect on August 5, 1993.[1] The FMLA started with a simple idea that was transformed by the legislative and regulatory process into an extraordinarily complex legal mandate. The simple idea was that parents, both mothers and fathers, should be able to take time off from their jobs to care for a new-born child. But quickly other reasons for leave were added to the bill: adoption or foster placement of

1. Pub.L. No. 103-3, 29 U.S.C. §2601 *et seq.* Regulations were issued by the U.S. Department of Labor ("DOL") on June 4, 1993. 58 Fed. Reg. 31794, 29 C.F.R. Part 825. Section numbers appearing in the text or footnotes of this pamphlet are from 29 C.F.R. Part 825.

a child, care of a sick family member, and treatment of the employee's own illness. As the bill worked its way through Congress three times, twice to be vetoed by President Bush, a bewildering array of amendments were added, some at the urging of labor and some at the behest of business.

As finally enacted and signed by President Clinton, the FMLA requires covered employers to grant eligible employees up to 12 weeks of unpaid leave during any 12-month period for: (1) the birth and first-year care of a child; (2) the adoption or foster placement of a child in the employee's home; (3) the care of a spouse, child, or parent with a serious health condition; or (4) the serious health condition of the employee. Employers are required to maintain any preexisting health insurance coverage during the FMLA leave, provided the employee pays his or her portion of the premiums. With some exceptions, employees are entitled to return to the same or an equivalent position at the end of FMLA leave and to the unconditional reinstatement of all fringe benefits.

The concept underlying the FMLA is that contemporary American life, particularly the demands made on families in which both husband and wife work outside the home, requires new sensitivity on the part of employers to the need for leave to permit employees to care for young children and ailing family members, among other reasons. The FMLA, therefore, creates a new form of leave, which will be referred to in this pamphlet as "FMLA leave." FMLA leave exists as a matter of statutory right, and is more generous in some respects than the standard leave policies offered by many universities. How universities must integrate the FMLA with existing institutional leave policies, and how universities can harmonize the requirements of the FMLA with other federal mandates, particularly the Americans with Disabilities Act, are subjects to the explored in this pamphlet.

The pamphlet will be organized as follows. First, basic FMLA concepts will be discussed, including eligibility for FMLA leave, notice requirements, medical justification, intermittent leave, relationship of paid to unpaid leave, benefits before and after leave, reinstatement to employment, and enforcement procedures. Next, a series of hypothetical situations, including Johnson's case, will be analyzed to highlight a number of practical problems in applying the FMLA to higher education. Finally, several special issues relating to implementation of the FMLA in higher education will be raised.

## Basic Concepts

The following is a discussion of the key provisions of the FMLA, particularly as they relate to higher education.

*Effective Dates.* The general effective date of the FMLA was August 5, 1993; however, where a collective bargaining agreement was in force on that date, the FMLA effective date is the termination date of the agreement or February 5, 1994, whichever is earlier. Implementation of the FMLA with respect to unionized employees will be discussed in Section IV of this pamphlet.

*Employer Notices.* Employers, including universities, must display an FMLA poster in conspicuous places on their premises. §825.300. If a university has an employee handbook describing policies for leave, wages, and similar matters, the handbook must also include information on the FMLA. §825.301(a). The most significant notice requirement, however, is triggered when an employee requests leave under the FMLA. At that time, the university must provide the employee with a written notice stipulating the specific expectations and obligations of the employee and explaining any consequences for failing to meet these obligations. §825.301(c). A partial list of the issues to be covered in this written notice includes the need for the employee to furnish medical certification of a serious health condition, the policies with respect to the substitution of accrued paid leave for unpaid FMLA leave, the rules pertaining to health insurance premiums during leave, and the policy on requiring a fitness-for-duty certificate in order to be restored to employment. A university's failure to provide this comprehensive notice when the employee requests leave may mean that the university will lose the ability to

take advantage of some of the more favorable provisions of the FMLA.[2]

*Covered Employers.* It appears that all public institutions are "covered employers" regardless of size. §825.108. However, in a peculiar drafting twist, staff at some small institutions, even if part of a multi-campus university, may not be entitled to FMLA leave because they do not meet the definition of "eligible employees," as described below. Private universities that have fifty or more employees on the payroll during each of twenty or more calendar weeks in the current or preceding calendar year are covered by the FMLA. §825.105. Employees on paid or unpaid leave and disciplinary suspensions, as well as part-time employees, are counted.

*Eligible Employees.* In order to be eligible for FMLA leave, an employee must have been employed by the university for at least 12 months (which do not need to be consecutive), worked at least 1,250 hours during the year preceding the commencement of the requested leave (the equivalent of approximately 25 hours per week for year-round employees), and currently be employed at a worksite where the university employs at least 50 employees within a 75-mile radius. §825.110(a) and (b). Accordingly, employees at small institutions (public as well as private) or at small branches of larger institutions at least 75 miles from the main campus may not be eligible for FMLA leave.[3]

On the other hand, it is not uncommon for large businesses to voluntarily extend FMLA coverage to employees working in small branch offices. In the same way, universities in such a situation should consider the policy implications of denying those employees the benefits of the FMLA while employees on the main campuses are covered. With respect to the 1,250 hour test, the DOL has determined that all full-time salaried employees who have worked for an employer for at least 12 months are presumed to have met the service requirement for FMLA eligibility. This presumption can be rebutted, however, if the employer can "clearly" demonstrate that the employee did not work 1,250 hours. §825.110(c).

*Family Members.* The FMLA permits employees to take leave when "needed to care for" a spouse, child, or parent. §825.113. Congress spent a considerable length of time debating these terms. The term "spouse" does not include an unmarried domestic partner, unless recognized under state law. The term "parent" does not cover parents-in-law, but it does include an individual who stood *in loco parentis* to the employee when the employee was a child. A "child" is defined as a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee stands *in loco parentis*, who either is under age 18, or is 18 and older and incapable of self-care because of a mental or physical disability. Both a mother and father may take family leave for the birth or adoption/foster placement of a child. §825.112(b). However, if both the husband and wife work for the same employer, even at different worksites, their combined total of FMLA leave for birth or adoption/foster placement is 12 weeks during any 12-month period. §825.202.

*Employee Notices.* If the need for FMLA leave is foreseeable, employees must give 30 days advance notice. Failure to do so means that commencement of the leave may be postponed until 30 days after the notice was given, provided proper FMLA posters were displayed at the worksite. When the need for leave is not foreseeable, employees should provide notice as soon as practicable, ordinarily within one or two business days after learning of the need for leave. §§825.302-304.

*Medical Justification.* Deciding whether the employee, or the family member for whom the employee wishes to care, suffers from a "serious health condition" will be an ongoing problem under the FMLA. Generally, the condition must cause a disability for a period of more than three days in addition to requiring continuing treatment by a health care provider. Congress did not intend the FMLA to cover short-term conditions

2. Examples of such provisions include defining "any twelve-month period" (§825.200), substituting paid leave under the employer's policies for unpaid FMLA leave (§825.207), and requiring a fitness-for-duty certification before returning to work after an FMLA leave (§825.310).

3. Even though a small public institution employing fewer than 50 faculty and staff would be a "covered employer," its employees probably would not meet the "eligible employee" test, which requires 50 employees within a 75-mile radius of the worksite.

for which treatment and recovery are very brief because such conditions are normally covered by sick leave policies. Nevertheless, because the FMLA permits intermittent leave or reduced leave schedule (see definitions below), it is apparent that Congress contemplated FMLA leave in some cases due to conditions that currently are not disabling. Thus, the DOL regulations provide that FMLA leave may be taken for treatment of a condition which, if left untreated, would likely result in a disability of more than three days. §825.114.

The regulations also take a very broad view of when an employee is "needed to care for" a family member with a serious health condition. §825.116. Both physical and psychological care are covered as are situations where family members are unable to provide for their own basic medical, hygienic, or nutritional needs or safety, or unable to transport themselves for medical treatment. Also included are providing "psychological comfort and reassurance" to a family member receiving inpatient care, filling in for others caring for the family member, or making arrangements relative to care of the seriously ill family member, such as organizing the transfer to a nursing home. Intermittent FMLA leave may also be taken when the family member's serious health condition itself is intermittent or when the employee is only needed intermittently to care for the family member, such as when another family member is sharing the responsibilities for such care.

In some instances, the employer may require medical certification from a qualified health care provider prior to granting FMLA leave. §825.305. In addition to physicians, in certain situations the DOL regulations permit such certification to be provided by podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, and Christian Science practitioners. §825.118. If the employer is not satisfied with the medical certification provided by the employee's health care provider, a second and third opinion may be obtained at the employer's expense. §825.307.

*Intermittent and Reduced Leave Schedule.* The FMLA permits leave to be taken either on a full-time basis or on an intermittent or reduced schedule basis. Intermittent leave is leave taken in separate blocks of time rather than for one continuous period of time. §825.203(b). A reduced leave schedule is a reduction in the employee's usual number of working hours per day or week. §825.203(c). Intermittent leave or a reduced leave schedule must be granted where there is a medical necessity, such as when an employee is recovering from a serious health condition but is not strong enough to work a full schedule or when such leave is necessary to care for an ill family member. However, employers have the discretion to grant or deny intermittent leave or a reduced leave schedule for first-year care of the employee's child or for adoption/foster placement of a child in the employee's home. §825.203(a). Employees requesting intermittent leave or a reduced leave schedule must attempt to arrange it so as not to disrupt the employer's operations. §825.117. If an employee requests foreseeable intermittent leave or a reduced leave schedule, the employer may, under certain circumstances, transfer the employee temporarily to an alternative position with equivalent pay and benefits. §825.117.

*Relationship of Paid and Unpaid Leave.* The FMLA permits an employee to elect or an employer to require that accrued paid leave be substituted for unpaid FMLA leave under certain circumstances. §825.207. The rules governing this are extremely complicated and should be reviewed carefully when a situation arises. In general, employers have an interest in reducing the total time that an employee may be absent from work. To accomplish this, many employers require employees to substitute, when the DOL regulations permit, any accrued paid leave for the unpaid FMLA leave. This may prevent an employee from exhausting all paid leave under the employer's policies and then taking the full 12 weeks of unpaid FMLA leave. If the employee has accrued paid vacation, personal, or family leave, the employer may require or the employee may elect to substitute such accrued leave for all or part of any FMLA leave. Similarly, the employer may require or the employee may elect to substitute any accrued paid sick leave for FMLA

leave taken due to the employee's own serious health condition. In general, the substitution of paid for unpaid leave can be made only when the employee discloses to the employer that paid leave is being requested for an FMLA purpose. §825.208.

*Benefits During and After FMLA Leave.* The university must maintain the employee's coverage under any group health plan (medical, substance abuse, mental health, dental, and vision) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave. §825.209. If the employee fails to pay his or her share of the premiums (assuming active employees must contribute toward their health insurance premiums), the university has the option of canceling the insurance or of paying the employee's share and recouping it after the employee returns to work. If the employee declines health insurance coverage during FMLA leave, the employer may cancel the coverage, but must then reinstate it unconditionally when the employee returns to work. Even if the institution's insurance carrier does not permit automatic reinstatement of benefits, the institution may still be responsible for ensuring that the employee has the same health benefits as similarly-situated employees who did not take FMLA leave.

If the employee fails to return to work, or returns but fails to stay for 30 calendar days, with some exceptions the employer may attempt to collect from the employee all health insurance premiums paid during the FMLA leave including the employer's share. §825.213. Other types of employee fringe benefits, such as life insurance, disability insurance, employee assistance programs, tuition reimbursement, and employer annuity contributions, may be discontinued during FMLA leave in accordance with the employer's policies, but must be reinstated immediately upon the employee's return to work. §825.215(d)(3). The benefits must be resumed at the same level as provided when the leave began, subject to any changes in benefit levels affecting the entire work force that may have taken place during the FMLA leave. §825.215(d)(1).

*Return to Work.* With some exceptions discussed below, an employee returning from FMLA leave is entitled to reinstatement in the same or in an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. §§825.214-215. However, if certain requirements are met, the university may deny reinstatement until an employee has submitted a fitness-for-duty certification. §825.310. Reinstatement may also be denied if the university can prove that the employee would have been laid off due to a bona fide reduction-in-force during the FMLA leave. A further reason to deny reinstatement is when the university can establish that the employee had been hired for a specific term that has expired, or only to perform work on a defined project that has been completed, and the university would not have continued to employ that person even if he or she had not been on FMLA leave. Certain "key employees" may also be denied reinstatement under specific conditions, as described more fully in the following sections of this pamphlet.

*Enforcement.* Eligible employees denied FMLA leave, or denied reinstatement at the end of leave in violation of the FMLA, may lodge a complaint with the DOL or file a private lawsuit against the employer to obtain damages and other relief. Damages may include lost wages, interest, liquidated damages equalling lost wages and interest, reinstatement, and reasonable attorneys' fees. §§825.400-404.

## Hypothetical FMLA Situations in Higher Education

### Hypothetical 1: Professor Johnson

Johnson's case was described in the Introduction to this pamphlet. To recap, he requested intermittent paid leave to take "Mary" to chiropractic treatments on one of the two days each week his classes meet.

#### *Discussion*

*1. Is Johnson an "Eligible Employee"?* An alert university administrator might ask whether Johnson fulfills the threshold FMLA requirement of working 1250 hours during the previous 12

months. He was on campus 36 weeks and had a total of 14 classroom and office hours per week. In the last 12 months, he filed a successful application for a small humanities grant but published no papers. He served on two university committees which had a total of eight meetings. He was the advisor to four graduate students.

Despite the possibility that Johnson's working time might fall below the FMLA threshold of 1250 hours, the DOL has determined that "in consideration of the time spent at home reviewing homework and tests, full-time teachers in ... institutions of higher education ... are deemed to meet the 1250 hour test." §825.110(c). It is possible to deny FMLA leave to a full-time faculty member, but the university "must be able to *clearly* demonstrate that such an employee did not work 1250 hours during the preceding 12 months." §825.110(c) (emphasis added). Doing so could be agonizing and create untold ill-will with the faculty.

2. *Is Johnson a "Key Employee"?* Considering Johnson's seniority at the university, he may be in the top 10% of all employees in terms of compensation, particularly using the FMLA method of dividing year-to-date earnings by the weeks actually worked by the employee. §825.217. If he meets these criteria, the FMLA classifies Johnson as a "key employee," and permits the university not to reinstate him after his FMLA leave if the university can establish that his reinstatement (not his absence from the university during FMLA leave) will cause "substantial and grievous economic injury" to the university. §825.218. However, the prospects of successfully using the "key employee" exception to deny Johnson reinstatement are dubious at best. Even if the conceptual problems of applying the exception to an employee taking leave on an intermittent basis could be overcome, it is not clear that the university could ever establish that the reinstatement of Johnson would cause "substantial and grievous economic injury."

3. *Who is "Mary"?* If she is Johnson's mother, wife, or daughter (provided she meets the definition of "child"), then he is permitted to take FMLA leave to transport her for necessary medical treatments. But if Mary is Johnson's sister, mother-in-law, unmarried domestic partner, professional colleague, or other friend or relative, then the FMLA would not require the university to grant him leave for her medical treatments. For the remainder of this analysis, it is assumed that Mary is Johnson's wife.

4. *Is the Chiropractor a Qualified Provider?* This hypothetical indicated that Mary's chiropractor had prescribed the treatment for which the leave is requested. Congress left the definition of the term, "health care provider," to the Secretary of Labor. In the DOL regulations, chiropractors are included within the definition, but only with respect to "treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." §825.118(b)(1). The university may require Johnson to obtain a written certification from the chiropractor of Mary's serious health condition.[4] §§825.305-306 and 311. If the diagnosis is outside the chiropractor's allowed area of expertise, the leave may be denied. Even if the diagnosis is within the DOL regulation, the university may require second and third medical opinions, at the university's expense. §825.307

5. *Is Johnson Eligible for Intermittent FMLA Leave?* Johnson requested leave on an "intermittent" basis; that is, one day per week. FMLA leave on an intermittent basis is permitted in order to transport a family member to medical treatments when the family member needs such assistance. §825.116. However, employees requesting intermittent FMLA leave "must attempt to schedule their leave so as not to disrupt the employer's operations." §825.117. The university certainly has a right, therefore, to require that Johnson schedule Mary's treatments on one of his non-class days. If Johnson is unable or unwilling to do this, the university has the right to assign him to an "alternative position with equivalent pay and benefits that better accommodates the employee's intermittent basis or a reduced leave schedule." §825.117. For example, he could be assigned freshman sections that meet at 8:00 a.m. on Mondays, Wednesdays, and Fridays. The practical and political conse-

4. The DOL suggested a certification form at 58 Fed. Reg. 31837-38 (June 4, 1993).

quences of such an assignment would have to be evaluated on a case-by-case basis.

*6. How Much Intermittent FMLA Leave May Johnson Take?* When FMLA leave is taken on an intermittent or reduced leave schedule, only the time actually taken as FMLA leave may be charged against the employee's 12 weeks of FMLA entitlement. If Johnson takes FMLA leave intermittently one day per week, he would use only one-fifth of a week of FMLA leave per each work week. Accordingly, he could follow this schedule (assuming Mary's chiropractic treatments remain medically necessary and she is unable to transport herself there) for an entire year and still not exhaust all of his FMLA leave entitlement. §825.205.

*7. Is the Leave Requested by Johnson Paid or Unpaid?* While the FMLA provides only the right to take unpaid leave, each university must look to its own policies and practices to determine whether FMLA leave in any particular case will be paid or unpaid. Unlike faculty in elementary and secondary schools, university faculty members usually are not eligible for any particular number of sick days per year; nor are they necessarily subject to any specific limitations on their use of sick days. However, if there is no university policy or practice permitting faculty to take intermittent days off for family members' medical treatment without loss of pay, then there is no requirement under the FMLA that such leave be paid. On the other hand, the FMLA does not supersede or discourage more generous leave provisions contained in employer policies, collective bargaining agreements, or state laws. §825.700. Accordingly, if the university already permits faculty to take days off with pay for family members' medical treatments, then Johnson would be entitled to do the same because the FMLA does not alter or supersede such policies.

*8. Summary.* If Johnson's wife, Mary, has a medical need for spinal manipulation treatments by a chiropractor and cannot transport herself to the chiropractor's office, then Johnson would be entitled to intermittent FMLA leave for that purpose. Assuming he uses one day per week, he could continue this leave for an entire year. However, Johnson would have to make every reasonable effort to arrange Mary's treatment on a day when he does not have class or accept an "alternative position" which better accommodates the requested leave. The question of whether such leave will be paid or unpaid will depend on his university's policies and practices with respect to such matters.

**Hypothetical 2: Vice President Smith**

Joyce Smith is the university's executive vice president for business and finance. She recently took eight weeks of unpaid leave to care for her ill mother-in-law who, lives in the Smith home. Upon returning to work, it was apparent that she was pregnant. Several weeks later, she informed the university president as follows:

> The baby is due in two months. Starting Monday, I will use my accrued vacation and sick leave (about eight weeks), then take four months of unpaid maternity leave guaranteed under state law. After that, I will take 12 weeks of unpaid leave for first-year child care provided by the FMLA. I expect to resume my duties as Executive Vice President for Business and Finance when I return to work in about nine months.

***Discussion***

*1. Is Smith an "Eligible Employee"?* One issue to consider when analyzing this hypothetical is to determine whether Smith will have worked 1250 hours in the 12 months immediately prior to the FMLA leave she has requested. If she has already taken eight weeks of leave to care for her mother-in-law and proposes to take another eight weeks of accrued vacation and sick leave followed by four months of maternity leave, she may not meet the threshold requirement for FMLA eligibility.

*2. Is Smith a "Key Employee"?* The discussion above in Hypothetical 1 pertaining to the FMLA exception for key employees is also pertinent here.

*3. Does the Eight Weeks of Leave Already Taken by Smith Count Against Her 12 Weeks of FMLA Eligibility?* It is tempting to say that Smith has already taken eight weeks of family leave and is, therefore, not entitled to take the full 12 weeks of FMLA leave to care for her child after the birth. However, even though her university permitted her to take this time off, care for a

parent-in-law is not covered by the FMLA. §825.113(b). Accordingly, such leave does not result in a deduction of the 12 weeks of eligibility of leave under FMLA.

*4. Does Taking Eight Weeks of Accrued Vacation and Sick Leave Count Against the 12 Weeks of FMLA Leave Eligibility?* The university may require or the employee may elect to substitute certain forms of paid leave for unpaid FMLA leave. Many employers include as a part of their FMLA policy a requirement that, where permitted under the FMLA, accrued paid leave must be substituted for unpaid FMLA leave. This is to prevent employees from taking various types of paid leave for FMLA purposes and then tacking on the full 12 weeks of unpaid FMLA leave. The regulations pertaining to the substitution requirement, however, are somewhat complicated and should be consulted in detail when such a situation arises.

Even if the university has adopted a requirement that paid leave must be substituted for unpaid FMLA leave, that does not provide the full answer as to whether Smith's eight weeks of accrued vacation and sick leave count against the 12 weeks of FMLA leave eligibility. Because Smith's baby is not due for about two months, it is unlikely that she will be suffering from a "serious health condition" when she begins using her accrued vacation. Accordingly, until she becomes disabled (a condition which would not allow her to work), she is not taking leave for an FMLA purpose and the substitution requirement would be inapplicable. However, at some point (presumably a week or two prior to the baby's due date), Smith would become disabled. Any paid leave taken after that point would be for an FMLA purpose and the substitution requirement could be applied.

*5. What is the Relationship of FMLA to State Maternity Leave Laws?* The FMLA does not supersede state laws providing more favorable leave entitlements. §825.701(a). Maternity leave is probably the prime example of this because many states have laws requiring employers to grant more than 12 weeks of leave for pregnancy, child birth, and any related complications. However, if the type of leave requested constitutes an entitlement under both state law and the FMLA, "the leave used counts against the employee's entitlement under both laws." §825.701(a). That is, Smith would concurrently exhaust her entitlements under both the state maternity leave law and the FMLA. In this hypothetical, if Smith takes four months of maternity leave under state law, this would probably also exhaust her 12 weeks of FMLA leave entitlement.

*6. How Does the University Define "Any 12-Month Period" under the FMLA?* An important, but somewhat esoteric, consideration in analyzing this case is how the university, as a matter of policy, has defined the term "any 12-month period." When Congress enacted the FMLA, it stated that eligible employees were entitled to 12 weeks of FMLA leave during "any 12-month period." 29 U.S.C.2612(a)(1). However, Congress never defined this term. Accordingly, the DOL regulations state that employers are allowed to choose one of several methods to compute the 12-month period from various alternatives, including a fixed 12-month period for all employees, 12 months measured forward from the first date leave is used, or a rolling 12-month period measured backward from the date leave is used. §825.200. In its discussion of the regulations, the DOL stated that the last option "is the only one which clearly would not allow 'stacking' of back-to-back leave entitlements, and seems clearly to be permissible under the plain meaning of the statutory language." Thus, many employers have adopted this particular definition of the term "any 12-month period." If the university in this case has so defined the term, then it would not have to permit Smith to take 12 weeks of FMLA leave after taking four months of maternity leave under state law. However, if the university defined "any 12-month period" in some other manner, such as a calendar year, then it is possible that Smith would have some FMLA entitlement even though she took four months of maternity leave under state law. This would depend on how the university defined "any 12-month period" and when her requested FMLA leave was to commence. Such a definition must be made when the university establishes its FMLA leave policy, and the university must

apply the same definition for all FMLA leave requests.

*7. Summary.* This hypothetical is primarily useful in analyzing the circumstances under which an employee would exhaust entitlement to FMLA leave. First, the leave taken by Smith to care for her ill mother-in-law would not exhaust her FMLA entitlement because in-laws do not fall within the definition of "parent" in the FMLA. That is, if Smith had been caring for an ill parent rather than a parent-in-law this eight weeks of leave would count against her FMLA entitlement. Second, the eight weeks of accrued vacation and sick leave would not start to count against her FMLA entitlement until she needed prenatal care or was disabled from working. §825.112(c). This assumes that the university has adopted a policy requiring employees to substitute various forms of paid leave for unpaid FMLA leave. Third, leave taken under state maternity leave laws would count against FMLA entitlement. Thus, if Smith took 12 weeks or more of leave under a state maternity leave law, she would completely exhaust her FMLA leave, at least during the same "12-month period" (as defined by the university).

**Hypothetical 3: Janitor Jones**

Randy Jones worked as a janitor in the university's residential life division. He injured his back during a softball game at a family reunion. Because he was unable to work, he requested FMLA leave. He had no accrued vacation or sick leave. He declined health insurance coverage and all other fringe benefits while on leave because he could not afford to pay premiums, so all coverages were canceled. After ten weeks of FMLA leave, Jones told his supervisor that he was ready to return to work. The university told Jones to get a "fitness-for-duty" certification as a condition for returning to work and reinstating his health insurance. Jones then submitted the following note from his physician:

> Randy has not fully recovered from his collision with third base. He has also recently developed a heart condition which is being treated with medication. I am limiting him to no more than six hours of light-duty work per day for the next six months.

The director of residential life then wrote to Jones as follows:



> Your former job was for eight hours, not six, so I can't use you anymore, especially with your doctor's light-duty restriction. Besides, Human Resources has told me that due to your heart condition, you will not be eligible for the university's health insurance again for 12 months. You can't work here without health insurance.

***Discussion***

*1. May the University Cancel Jones' Health Insurance and Other Benefits While He is on FMLA Leave?* The university must maintain Jones' health insurance during FMLA leave provided that Jones is willing to continue to pay his share of the premiums. Employees unwilling to do so may choose not to retain health insurance coverage during FMLA leave. §825.209(e). However, the university must be extremely careful about canceling the insurance in such a situation because when Jones returns to work he is entitled to full reinstatement of his health insurance without any waiting period, physical examination or new pre-existing condition exclusions. Unlike health insurance, other types of insurance fringe benefits such as term life insurance and disability insurance, even if fully paid by employees, may be dropped during FMLA leave provided the university does not have "more generous leave policies" requiring the maintenance of such benefits. §§825.215(d)(3) and 825.700(b). However, as with health insurance, these types of coverage must be reinstated unconditionally as soon as the employee returns to work after FMLA leave.

*2. May the University Require Jones to Obtain a "Fitness-for-Duty" Certification Before Returning to Work?* Jones may be denied restoration to employment until he submits a fitness-for-duty certification, provided that the university has met certain requirements. §825.310. For example, the university must have a "uniformly-applied" policy of requiring all employees who take leave for similar conditions to submit such certification. Such a policy may be based on the nature of the illness or the length of the absence. §825.310(a). Also, the employee must receive specific notice at the time leave was requested that a fitness-for-duty certification would be required prior to returning to work. On the basis of this hypothetical, it is not clear whether the

university had a "uniformly-applied" policy or whether Jones, when he requested leave, was informed that such a certification would be required. Regardless, the fitness-for-duty certification cannot be used as a precondition for reinstating Jones' health insurance except to the extent that the failure to submit such certification prevents an employee from returning to work. As mentioned above, reinstatement of one's health insurance is unconditional upon returning to work.

*3. Is Jones Entitled to Return to Work on a Six-Hour Schedule?* The FMLA permits leave to be taken on a "reduced leave schedule." §§825.116(c) and 825.800. Although the need for a reduced leave schedule appears to be based, at least in part, on a heart condition developed after Jones commenced FMLA leave, that would have no impact on his eligibility for a limited working schedule. However, he has already taken 10 full weeks of FMLA leave, so he is only entitled to 80 more hours of FMLA leave. (This assumes the university has defined "any 12-month period" to prevent Jones from "stacking" his FMLA leave.) Accordingly, Jones would be eligible to work six hours per day for eight weeks before exhausting all FMLA entitlement for the current "12-month period." Of course, Jones would be entitled to only six hours of wages per day, not eight hours, while working on a reduced schedule.

*4. What Happens When Jones Exhausts All FMLA Leave Entitlement?* The hypothetical indicates that Jones' doctor requested six hours of light-duty work per day for the next six months, but all FMLA entitlement is exhausted after eight weeks. At this point, the university's obligations are not determined by the FMLA, but rather by the Americans with Disabilities Act (ADA). §§825.215(b) and 825.702(b). In this regard, assignment of "part-time or modified work schedules" is one of the principal examples of reasonable accommodation described in the *ADA Technical Assistance Manual* released by the U.S. Equal Employment Opportunity Commission on January 27, 1992 (§3.5). Whether an employer is required to provide a part-time or modified work schedule is a matter to be decided based on the particular facts and circumstances of the case.

*5. What About the Request for Light-Duty Work?* This is also not an FMLA issue, although it is likely to arise with some frequency following FMLA leaves. The ADA requires that the employee must be able to perform the "essential functions" of the position with or without a "reasonable accommodation." One example of a reasonable accommodation described in the *ADA Technical Assistance Manual* is "restructuring a job by reallocating or redistributing marginal job functions." The university's obligation to provide Jones with light-duty work under the ADA, therefore, would depend upon the specific facts of the situation.

*6. May a Health Insurance Waiting Period be Imposed for a New Medical Condition Detected While Coverage Was Discontinued at the Employee's Request?* All fringe benefits must be reinstated unconditionally when the employee returns to work. Even if an employee developed a new health condition during an FMLA leave, the health insurance must be reinstated without any new exclusions for pre-existing conditions as soon as the employee returns to work. This again raises the question of whether an employer should ever cancel health insurance during an FMLA leave, even when the employee specifically declines such coverage or elects coverage but fails to pay his or her share of the premiums.

*7. Summary.* Jones is entitled to the unconditional reinstatement of his health insurance when he returns to work. At least for the first eight weeks after returning to work, Jones is entitled, under the FMLA, to work a six-hours-per-day schedule. Once he has exhausted all FMLA entitlement, however, the university's obligation to provide part-time work will be governed by the ADA. The result will depend upon whether Jones can perform the "essential functions" of his position and whether the part-time schedule and the light-duty restriction are "reasonable accommodations" under all of the circumstances of the situation.

## Special Issues

This section is devoted to several key problems that may arise as the FMLA is implemented in higher education.

*Unionized Employees.* The FMLA effective date for employees subject to collective bargaining agreements is February 5, 1994, six months later than the general effective date. According to the DOL, this is because Congress "contemplated that collective bargaining agreements will be amended to conform to FMLA during the extended effective date." §825.700(c). This raises some interesting issues relative to implementing the FMLA for unionized university employees. Clearly, on February 5, 1994, unionized employees were entitled to all FMLA rights regardless of whether or not their collective bargaining agreements had been amended by that date. However, it is far less clear whether the university could take advantage of some of the FMLA's pro-management options (e.g., the definition of "any 12-month period" and substitution of paid for unpaid leave). The university's obligation, if any, to bargain on these issues with the unions is determined, not by the FMLA, but by the National Labor Relations Act for private universities, and by state labor laws for public universities. The question, then, is whether, under the pertinent statute and case law, the various provisions of a university's FMLA policy affect the"terms and conditions of employment" in a way that would make those provisions mandatory subjects of bargaining.

Based on their interpretation of the law, universities may take a variety of approaches in implementing the FMLA with respect to unionized employees. Some universities have done nothing about adopting an FMLA policy or amending existing collective bargaining agreements on the grounds that any requests for FMLA leave from unionized employees will simply be handled in accordance with the FMLA regulations. This is probably a poor strategy, because it leaves the university open to simultaneous charges that it has failed to comply with the FMLA and to negotiate mandatory bargaining subjects with the union. Another approach would be to adopt an "interim" FMLA policy and notify the union that a final policy will be negotiated during the next regular round of bargaining. Still another approach would be to adopt an FMLA policy and invite the union to engage in "impact bargaining" over any terms and conditions of employment affected by the policy. Yet another approach would be to engage the union in active negotiations over the details of an FMLA article to be added to the existing collective bargaining agreement. The final decision on which strategy to adopt should be made only after careful consultation with labor counsel.

*Academic Year Work Schedules.* Many university employees work on an academic year schedule and have the summer months off. This can pose several issues under the FMLA. The first is whether such a schedule affects the employee's eligibility for FMLA leave. As discussed in Section II, one of the requirements for an FMLA-eligible employee is to work 1250 hours during the year preceding the beginning of the requested leave. For hourly (or so-called FLSA non-exempt) employees, having the summer months off might indeed jeopardize their FMLA eligibility, depending on their working schedule during the academic year (e.g. a six-hour work day during the academic calendar would probably result in less than 1250 hours of work per year). Full-time salaried (FLSA-exempt) employees, on the other hand, are "presumed" to satisfy the 1250-hour test. §825.110(c). This is true even for faculty, many of whom work on an academic year calendar.

Another FMLA issue that may arise with respect to the academic year work schedule is how the summer months will be counted towards the 12 weeks of FMLA leave entitlement. For example, if an academic year employee has a baby in July, will the period of hospitalization and the time spent caring for the baby during the summer months count against the 12 weeks of FMLA entitlement? Although the DOL regulations do not address this specific point, it appears that time devoted to FMLA-qualifying events during a part of the year the employee is not otherwise scheduled to work would not count against the 12 weeks of FMLA entitlement. The same result would ensue if the FMLA-qualifying

event occurred relatively late in the academic year and the employee was on FMLA leave when the summer break began, i.e., only the time out of work prior to the normal summer break would count toward the 12 weeks of FMLA entitlement.

*"Key Employee" Exception.* As discussed above in connection with Professor Johnson's case, the FMLA contains a special provision which, under certain circumstances, permits an employer not to reinstate a highly-compensated employee at the conclusion of FMLA leave. There is a some skepticism, however, that this exception has been so narrowly drawn by Congress and the DOL that the chances of ever utilizing it successfully are remote. To do so, the university would have to maintain a running tabulation of the top 10% of its employees in terms of compensation. An employee on that list requesting FMLA leave would have to be notified at the time of his or her request that he or she is classified as a key employee, and could possibly be denied reinstatement at the conclusion of the FMLA leave. As soon thereafter as the university actually determines that reinstatement of the key employee would cause "substantial and grievous economic injury" to the university, the employee must be so notified and given the option of discontinuing the FMLA leave and returning to work. Thus, even if the university could establish the level of economic injury to the institution necessary to deny reinstatement, the "key employee" could avoid the consequences by simply returning to work at that time. If the employee chooses not to return immediately, he or she may still request reinstatement at the end of the FMLA leave. The university "must then determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time." §825.219(d).

It is expected that universities will rarely, if ever, be able to demonstrate the degree of economic injury necessary to deny reinstatement to employment, particularly when such injury must be caused by the reinstatement of the "key employee," not by his or her absence during the FMLA leave. Accordingly, universities should carefully consider whether it even makes any sense to include a "key employee" exception in their FMLA policy.

*Substitutions of Paid Leave for Unpaid FMLA Leave.* The rules governing how an employer may implement its requirement that various types of paid leave be substituted for unpaid FMLA leave are very complex. §825.207. A question that frequently arises is whether time out of work on a short-term disability plan or workers' compensation counts against the 12 weeks of FMLA leave entitlement. Some universities have short-term disability plans which, after an employee has exhausted accrued sick leave, provide payments for a period of weeks or months at a percentage of the employee's salary or wages. The DOL is relatively clear in its interim regulations that an employer may require an employee to substitute paid leave for unpaid FMLA leave "under a plan covering temporary disabilities." §825.207(c)(2). But the DOL regulations do not address the question of employees out of work and receiving workers' compensation benefits. In response to telephone inquiries, the DOL is currently taking the position that a condition qualifying an employee for workers' compensation under state law would almost always satisfy the FMLA definition of "serious health condition." This may have an interesting, and potentially far-reaching consequence. It means that if an employee out of work on workers' compensation benefits seeks to return to work before exhausting the FMLA entitlement, the employer will be required to offer reinstatement even if state law does not otherwise guarantee job restoration to an employee who has been out of work due to a work-related illness or injury. Further guidance may be forthcoming when DOL issues policy interpretations and final regulations.

*Deductions from Compensation of Salaried Employees for Intermittent FMLA Leave.* Universities must be extremely careful about making deductions from the compensation of salaried employees because of the risk of losing the overtime exemption under the Fair Labor Standards Act ("FLSA"). DOL regulations are very strict about such deductions. In general, deductions may be made only for absences of a day or more if the employee is absent for personal

reasons, or for sickness or accident and has exhausted all sick leave under a "bona fide" sick pay plan.[5] 29 C.F.R. §541.118. Accordingly, with certain exceptions, deductions may not be made from the compensation of a salaried employee who is absent for only a portion of a day or who is absent for a day or more for sickness or accident, and who does not have any sick leave plan. The FLSA notwithstanding, the FMLA contains a special provision permitting employers to make salary deductions for FMLA leave taken intermittently or on a reduced leave schedule. 29 U.S.C. §2612(c). Universities should be careful, however, in researching whether or not laws in their particular states would in fact permit such deductions.

*Relationship of the FMLA and the ADA.* The hypothetical involving Janitor Jones illustrated several types of interplay between the FMLA and the ADA. There will probably be many instances when an employee will return to work from an FMLA leave (either because all FMLA entitlement has been exhausted or the employee's health condition has significantly improved) and request a reduced working schedule, light-duty assignment, or some other type of "reasonable accommodation." At this point, the university will need to analyze whether the employee is a "qualified person with a disability" and whether he or she can perform the "essential functions" of the position with the requested reasonable accommodation. There is also the issue of whether the requested accommodation is an "undue hardship" on the university. These are all fact-specific determinations that can only be made at the time the issue arises. Nevertheless, it is entirely possible for an employee to utilize the ADA to parlay an FMLA leave into an extended period of part-time or light-duty work. In order to ensure compliance with both laws, university administrators should become familiar with the relationships between the university's obligations under the FMLA and under the ADA.

5. It is beyond the scope of this pamphlet to discuss all of the issues pertaining to salary deductions for exempt employees. For example, there have been recent developments regarding deductions for short personal absences of exempt employees in the public sector. 29 C.F.R. §541.118 (a) (6). Competent legal advice should be sought if such an issue arises.



*Accrual of "Service Credit" in Pension Plans While on FMLA Leave.* A question arises whether DOL has properly interpreted the FMLA with respect to employees earning "service credit" under pension and retirement plans while on FMLA leave. The FMLA itself states that taking leave "shall not result in the loss of any employment benefit accrued *prior* to the date on which the leave commenced." (Emphasis added.) 29 U.S.C. §2614(a)(2). Further, the FMLA states that nothing in the law "shall be construed to entitle any restored employee to ... the accrual of any seniority or employment benefits during any period of leave." 29 U.S.C. §2614(a)(3). The issue arose because the DOL regulations state: "With respect to pension and other retirement plans, any period of FMLA leave will be treated as continued service (i.e., no break in service) for purposes of vesting and eligibility to participate." §825.215(d)(4). Many pension plan administrators have written to the Secretary of Labor, arguing that the DOL has misinterpreted the FMLA. It is expected that the DOL will revisit this issue when it publishes additional interpretations.

**Final Thoughts**

It should be apparent from reading this pamphlet that the FMLA is anything but a simple piece of legislation. In fact, the statute and the implementing regulations constitute a surprisingly complex, and even formidable, set of legal requirements. Complying with all of them will not be a passive activity. In shaping a university's FMLA policies and administering its procedures, there are no short-cuts, no "plan in the can" forms that will meet every institution's needs, and no substitutes for a thorough understanding of the law and the regulations. Yet, as always, conscientious administrators and attorneys in higher education will gradually master the issues and move their institutions into FMLA compliance.

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